

BEFORE THE  
BOARD OF VOCATIONAL NURSING  
AND PSYCHIATRIC TECHNICIANS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation  
Against:

DAPHNE LEANNE ERVIN  
258 N. G Street, #11  
Porterville, CA 93257

Case No. PT-2005-1331

Psychiatric Technician License No.  
PT 32867


Respondent

DECISION DENYING PETITION FOR RECONSIDERATION

The Board of Vocational Nursing and Psychiatric Technicians hereby denies your Petition for  
Reconsideration of its March 25, 2009 Decision in the above-entitled matter.

This Decision shall become effective on April 4, 2009.

IT IS SO ORDERED this 3<sup>rd</sup> day of April, 2009.

  
John P. Vertido, L.V.N.  
President

BEFORE THE  
BOARD OF VOCATIONAL NURSING  
AND PSYCHIATRIC TECHNICIANS  
DEPARTMENT OF CONSUMER AFFAIRS  
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In the Matter of the Accusation  
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DAPHNE LEANNE ERVIN  
258 N. G Street, #11  
Porterville, CA 93257

Case No. PT-2005-1331


Psychiatric Technician License No.  
PT 32867

Respondent.

**ORDER DELAYING DECISION**

Pursuant to Section 11521(a) of the Government Code, the Board of Vocational  
Nursing and Psychiatric Technicians (Board) hereby issues this Order Delaying Decision in the  
above-stated case until April 4, 2009. The purpose of the delay is to permit the Board to review your  
Petition for Reconsideration.

IT IS SO ORDERED this 20<sup>th</sup> day of March, 2009.

  
John P. Vertido, L.V.N.  
President

BEFORE THE  
DEPARTMENT OF CONSUMER AFFAIRS  
BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS  
STATE OF CALIFORNIA

In the Matter of the Accusation  
Against:

Case No. PT-2005-1331

DAPHNE LEANNE ERVIN  
258 N. G Street, #11  
Porterville, CA 93257

OAH No. L2007110727

Psychiatric Technician License  
No. PT 32867

Respondent.

## DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Vocational Nursing and Psychiatric Technicians as the final Decision in the above-entitled matter.

This Decision shall become effective on March 25, 2009.

IT IS SO ORDERED this 23rd day of February, 2009.

John P. Vertido, L.V.N.  
President

BEFORE THE  
BUREAU OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DAPHNE LEANNE ERVIN  
Porterville, California

Psychiatric Technician License PT 32867,

Respondent.

Case No. PT-2005-1331

OAH No. 2007110727

**PROPOSED DECISION**

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in Visalia, California, on July 21, 2008.

Leslie A. Burgermyer, Deputy Attorney General, represented the complainant, Teresa Bello-Jones, J.D., M.S.N., R.N., Executive Officer of the Bureau of Vocational Nursing and Psychiatric Technicians.

Steven Bassoff, Attorney at Law,<sup>1</sup> represented the respondent, Daphne Leanne Ervin.

Complainant submitted a closing brief, which was marked as exhibit C 24. Respondent submitted a closing brief, which was marked as R 4. Complainant submitted a reply brief, which was marked as C 25. The undersigned administrative law judge issued an order granting complainant's motion to amend the accusation and orders asking for the parties' contentions pursuant to Government Code section 11516. The orders were dated September 25, 2008, and marked as exhibit C 26. Complainant filed a third amended accusation, which was marked as C 27 and received in evidence for the purpose of establishing jurisdiction. Respondent submitted a supplemental argument, which was marked as R 5. Complainant submitted a reply to respondent's supplemental argument, which was marked as C 28.

Complainant's reply to respondent's supplemental argument was received on November 25, 2008, and the record was closed.

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<sup>1</sup> Steven Bassoff, Attorney at Law, 1220 S Street, Suite 100, Sacramento, California 95811.

## SUMMARY AND ISSUES

Respondent worked at a developmental center as a pre-licensed psychiatric technician for approximately two months before she was licensed and for approximately one month after she was licensed. After she obtained her license, she continued to work in a pre-licensed capacity. At no time did the developmental center employ her as a licensed psychiatric technician.

Respondent failed to maintain professional boundaries with a client in that she exchanged personal telephone calls with him and disclosed personal information to him. She did these things both before and after she was licensed as a psychiatric technician.

Respondent concedes that the bureau may discipline her license based on her failure to maintain professional boundaries during the one month after she was licensed. Do the applicable statutes and regulations permit the bureau to discipline her license based on her failure to maintain professional boundaries during the two months before she was licensed?

Complainant alleges that respondent, before she was licensed, engaged in sexual intercourse with the client.

Did respondent engage in sexual relations with the client?

If respondent engaged in sexual relations with the client, do the applicable statutes and regulations permit the bureau to discipline her license in spite of the fact that the conduct occurred before she was licensed?

Does engaging in sexual relations with a client constitute unprofessional conduct?

Did respondent commit an act of sexual abuse, misconduct, or relations with a patient, client, or customer?

If respondent had sexual intercourse with the client, was the touching against his will?

If respondent had sexual intercourse with the client, was he, because of a mental disorder or developmental or physical disability, incapable of giving legal consent?

If respondent had sexual intercourse with the client and if he, because of a mental disorder or developmental or physical disability, was incapable of giving legal consent, did respondent know that or is it reasonable to conclude that she should have known that?

What discipline should be imposed?

The bureau seeks cost recovery. If respondent's license is disciplined, the following issues arise. Would assessing the full costs unfairly penalize respondent? Did respondent have a good faith belief in the merits of her position? Did respondent raise a colorable

challenge to the proposed discipline? Will respondent be financially able to make payments? Did the bureau conduct a disproportionately large investigation and prosecution to prove that respondent engaged in relatively innocuous misconduct?

## FACTUAL FINDINGS

### *LICENSE*

1. On August 26, 2005, the Bureau of Vocational Nursing and Psychiatric Technicians issued psychiatric technician license number PT 32867 to the respondent, Daphne Leanne Ervin.

2. The bureau seeks suspension or revocation of respondent's license. Most of the conduct that is alleged as grounds for license discipline is alleged to have occurred before respondent was licensed. At the time the bureau issued the license, the bureau staff knew nothing about the events that give rise to the allegations. There is no allegation, however, that respondent had an obligation to disclose those events.

### *BACKGROUND*

3. Respondent attended a psychiatric technician training program at Porterville College.

4. In approximately March of 2005, while respondent was in the Porterville College program, she began working at Porterville Developmental Center (PDC) as a psychiatric technician trainee. On approximately July 1, 2005, after respondent completed the Porterville College program, she worked at PDC as a pre-licensed psychiatric technician (PLPT). Respondent was never employed at PDC as a psychiatric technician.

### *TRAINING*

5. PDC facility bulletin number 85, dated March of 2005, concerns boundaries and staff interaction with clients. It provides, in part, as follows:

Employees are responsible for the provision of a safe and therapeutic environment where clients receive care and are protected from harm. Employees shall not jeopardize client treatment or facility security by engaging with them in unprofessional or non-therapeutic interactions. Employees are to maintain appropriate boundaries and interactions consistent with clients' treatment plans.

■ ■ ■ ■

Appropriate staff/client interactions are those interactions which are based upon and support the planned treatment of the client.

[¶] ... [¶]

Inappropriate staff/client interactions are those which compromise a client's treatment plan and jeopardize an employee's professional role. Examples of inappropriate staff/client interactions include (but are not limited to ) romantic/sexual involvement . . . . A personal or social connection with a client creates an inappropriate, non-professional relationship which may place the client and employee in a vulnerable position, jeopardize facility security, and compromise client treatment outcomes.

[¶] ... [¶]

[T]he following activities [also] constitute inappropriate staff/client interactions. [¶] ... [¶] Establishing a social or personal connection with clients and/or their families. [¶] ... [¶] Accepting personal telephone calls, notes, and/or letters from clients and making the same to clients, except in the line of duty.

6. In March of 2005, respondent received training that included these policies and examples.

7. PDC facility bulletin number 103, dated June of 2005, concerns client abuse, mistreatment, or neglect. It provides, in part: "Porterville Developmental Center . . . prohibits client abuse, mistreatment, exploitation, and neglect whether perpetrated by staff [or others] . . . . Every staff member of PDC is responsible for the safety and well-being of clients."

An earlier version of bulletin 103 was in effect in March of 2005, and the quoted material was in the earlier version. On March 21, 2005, respondent signed a statement acknowledging that she had read and understood facility bulletin number 103.

8. PDC facility bulletin number 156, dated August of 2005, concerns standards of conduct for personnel. It provides, in part, as follows:

Porterville Developmental Center staff play a vital role in ensuring that the facility operates effectively, that a pleasant work environment exists, and that clients receive a quality level of service.

[§] ... [§]

All staff are expected to conduct themselves in a professional manner and refrain from behavior that might be detrimental or embarrassing to clients, employees, other individuals, or the State. Examples of conduct that might lead to disciplinary action up to and including dismissal include, but are not limited to [§] ... [§] client abuse, manipulation, neglect, violation of any client's rights, or dual relationship.

9. An earlier version of bulletin 156 was in effect in March of 2005, and the quoted material was in the earlier version. Respondent testified that she was sure she had seen bulletin number 156

10. A PDC job description for PLPTs dated October 24, 2000, provides, in part, as follows:

[A pre-licensed psychiatric technician] provides basic and general behavioral training, psychiatric nursing care, and professional custody services to clients following established standards and procedures.

[§] ... [§]

Participates as a member of the Interdisciplinary Team in all aspects of the development and implementation of the [individual program plan].

[§] ... [§]

You are expected to follow all safety procedures and complete all assigned duties in a safe manner plus maintain a safe, sanitary, and therapeutic environment which promotes respect and dignity for clients and protects the privacy, rights, confidentiality, and physical/emotional well-being of clients.

[§] ... [§]

Assures the personal dignity and physical well-being of clients. Works closely with Individual Plan Coordinator, QMRP, and other members of the Interdisciplinary Team in implementing comprehensive individualized programs for clients. [§] ... [§] Continuously assists clients in areas of their needs and interest, maintaining their integrity, dignity, and rights as individuals.



[¶] . . . [¶] Helps create a safe, therapeutic, and home-like environment.

11. Respondent was given a copy of this job description when she began working as a PLPT, and she was given training concerning her duties and obligations.

12. Respondent testified that she had training on a number of bulletins.

13. It is found that respondent was very familiar with the proposition that she was responsible for providing a safe and therapeutic environment for clients. She knew that, by engaging in unprofessional conduct with a client, she was jeopardizing his treatment and the security of the facility, and she knew she was violating PDC policies.

#### *CLIENT CM*

14. In 2005, CM was a client at PDC. He is mentally retarded.

15. CM was committed to PDC in 1999 pursuant to a civil commitment. A court must review a civil commitment annually. If a party files a petition for recommitment and PDC staff concludes that the committed person continues to be a danger to himself or others, a certification of mental retardation and dangerousness is prepared. The last certification of mental retardation and dangerousness that was prepared regarding CM is dated March 14, 2007. It referred to a February 27, 2003, assessment that placed CM's IQ at 70, which is in the mild mental retardation range.

16. CM had a history of being verbally aggressive and harming others. An interdisciplinary team had created two behavior plans for him, an individual program plan (IPP) and a therapeutic plan. The behavior plans were designed to assist CM in modifying his maladaptive behaviors. Garry Miller, Ph.D., is the Senior Psychologist at PDC. He executed a declaration that is in evidence. He also testified at the hearing. He reviewed CM's behavior plans and concluded as follows: A PLPT's having a personal telephone relationship with CM was contra-indicated for CM's therapeutic plan. A PLPT's having sexual relations with CM was contra-indicated for CM's therapeutic plan.

#### *FACTS REGARDING ALLEGED MISCONDUCT*

17. While respondent worked at PDC she violated the center's policy on maintaining professional boundaries with clients. Between June 4 and October 3, 2005, respondent had approximately 394 personal telephone conversations with CM and disclosed personal information to him. She gave him her telephone number. She called him, and he called her. She talked with him about her personal life. The average length of the telephone conversations was 20 minutes. Some of the conversations took place before respondent was licensed. Some took place after.

18. Respondent acknowledges that it was inappropriate for her to have personal telephone conversations with a client.

19. In June of 2005, Jim Bradley, respondent's supervisor, received reports that respondent was spending too much time with CM. On June 28, 2005, Mr. Bradley and Cheryl Scates, a nursing coordinator, counseled respondent regarding boundaries issues. Respondent denied that she had a problem with boundaries.

20. Respondent was married, but in late June of 2005, she and her husband separated. She moved out of the family home. They have three children. Respondent kept the children when her husband worked, and he kept the children when she worked.

21. On approximately August 23, 2005, in a restroom at PDC, respondent had sexual intercourse with CM.

22. Respondent denies having had sex with CM. She testified that it would be inappropriate for a member of the PDC staff to have sex with a client.

23. Respondent and Janie Contreras had been classmates in the Porterville College program. When they were in school, they occasionally had lunch together, and they became friends. In 2005, Ms. Contreras, like respondent, worked at PDC. On approximately August 6, 2005, respondent and Ms. Contreras went out for drinks and dancing. They pulled into the parking lot of a night spot in Visalia, and respondent used her cell phone to call PDC. She asked to speak with CM. Ms. Contreras asked, "What are you doing?" Respondent told Ms. Contreras that she had been talking with CM daily. During the conversation between respondent and Ms. Contreras, they talked about boundaries. Respondent said, "You don't know the half of it." She then told Ms. Contreras that, on one occasion, in a restroom at PDC, she engaged in sexual intercourse with CM. Ms. Contreras reminded respondent that she could lose her license and go to jail. Respondent replied that she might lose her job but not her license. Ms. Contreras does not recall exactly what words respondent used – intercourse, sex, or some other term – but she is confident that respondent used a term that referred to sexual intercourse.

24. On August 23, 2005, Ms. Contreras told her supervisor, Martin Michner, what respondent had told her. This was approximately 17 days after respondent told Ms. Contreras about her involvement with CM.

25. Business and Professions Code section 4521, subdivision (a), provides that unprofessional conduct is a ground for suspending or revoking a psychiatric technician license. Business and Professions Code section 4521, subdivision (1), provides that the bureau may suspend or revoke a psychiatric technician license if a licensee fails to report the commission of any act prohibited by section 4521. Thus, Ms. Contreras was at risk of losing her license if she failed to report what respondent had told her, and Ms. Contreras knew that. Why, in spite of knowing that, did she wait approximately 17 days to report? She testified that she was late in reporting because she was scared.

26. On August 23, 2005, PDC took respondent off of client contact and placed her in an administrative assignment pending an inquiry regarding the allegations of misconduct.

27. Warren Lozano had gone through the Porterville College program with respondent and Ms. Contreras. In 2005, he, too, worked at PDC. When respondent learned that someone had made allegations against her and that she had been placed in an administrative assignment, she was very upset. She encountered Mr. Lozano. As they walked through a gate together, she told him that allegations had been made and that she had been taken off of her unit. A couple of days after that, respondent called Mr. Lozano on the phone and asked what she should do. Mr. Lozano asked her what was going on. Respondent replied that there was a rumor that she slept with a client. Mr. Lozano asked whether she had, and she said, "Yes, I slept with CM." Mr. Lozano asked respondent what made her do something stupid like that. Respondent began crying and said that she was the dumbest person in the world. Mr. Lozano told respondent that he could not help her. Two days later, Mr. Lozano reported the conversation to a supervisor.

28. As noted above, the bureau issued a psychiatric technician license to respondent on August 26, 2005. That was two days after PDC placed her in a non-contact position. At the time the bureau issued the license, the bureau staff did not know that PDC had placed respondent in a non-contact position and did not know of the allegations that caused PDC to do that.

29. Respondent continued in the non-contact position until December 23, 2005, when, pursuant to the terms of a settlement, she resigned from PDC.

#### *CREDIBILITY ISSUES REGARDING FINDING THAT RESPONDENT HAD SEXUAL INTERCOURSE WITH CM*

30. As noted above, respondent denies having had sexual intercourse with CM. The finding that she did have sexual intercourse with him is based on the statements of Ms. Contreras and Mr. Lozano as to what respondent told them and on the circumstantial evidence of respondent's having had approximately 394 personal telephone conversations with CM between June and October of 2005. Ms. Contreras and Mr. Lozano were more credible than respondent was.

31. Ms. Contreras testified that she harbored no ill will toward respondent and that, except for the matter concerning CM, she had never had any reason to discontinue her friendship with respondent. Ms. Contreras testified that she had not wanted to become involved in this sort of thing.

32. Respondent testified that she had never had any problems with either Ms. Contreras or Mr. Lozano and did not know why they were making false statements against her.

33. There is no evidence that Ms. Contreras and Mr. Lozano conspired to report that respondent told them she had sex with CM. There is no evidence that Mr. Lozano was

involved in the matter in any way at the time Ms. Contreras reported. Respondent told Mr. Lozano that someone had made an allegation against her. But there is no evidence that, at the time Mr. Lozano reported, he knew that Ms. Contreras was the accuser.

#### *REHABILITATION*

34. An employee's having sex with a client has the potential for causing harm to the client. It can result in debilitating emotional problems. There is no evidence that CM actually suffered harm, but respondent exposed him to a risk of harm. Moreover, an employee's having sex with a client who has a history of harming others can jeopardize security. The client might physically harm the employee and place other employees, the client, and other clients at risk.

35. There is no evidence of other disciplinary actions against respondent, but on June 28, 2005, Mr. Bradley and Ms. Scates counseled respondent regarding boundaries issues, and respondent, nevertheless, continued having personal telephone conversations with CM. Between the time Mr. Bradley and Ms. Scates counseled respondent and October 3, 2005, respondent had over 300 personal telephone conversations with CM.

36. There is no evidence of any mitigating circumstance. Respondent had been well trained concerning boundaries issues. She had that training in the Porterville College program and at PDC.

37. There is no evidence that respondent had any contact with CM after October 3, 2005. There is no evidence that respondent has engaged in any wrongful conduct for over three years.

38. Since October of 2006, respondent has worked as a private contract employee, in the capacity of a psychiatric technician, for the California Department of Corrections and Rehabilitation. Since October of 2006, respondent has worked at the Substance Abuse Treatment Facility and State Prison at Corcoran. From March 5 to June 21, 2007, respondent also worked at North Kern State Prison. She usually works 60 hours a week.

39. Respondent testified that she has had several evaluations concerning her work for the Department of Corrections and that all of them have been satisfactory. Respondent submitted 12 letters of reference from people with whom she has worked at Corcoran Prison and North Kern Prison. All of them are very complimentary. Most of them describe respondent in glowing terms. Richard P. Berkson, M.D., Chief Psychiatrist at Corcoran, notes that respondent substituted for the regular Keyhez Coordinator who was off of work due to an injury. Dr. Berkson said respondent is very reliable and does an outstanding job in a difficult position. One colleague wrote that respondent demonstrates excellent work ethics, shows the ability to set boundaries, has outstanding knowledge of policies and procedures, and is a valuable asset. Other colleagues and supervisors wrote of respondent's dedication, professional demeanor, industry, intelligence, motivation, and ability to set proper limits.



Respondent testified that she had not told the letter writers about the circumstances surrounding her resignation from PDC.

#### *COSTS*

40. Complainant submitted a certification of costs showing costs of investigation and enforcement in the amount of \$13,914. The evidence shows that those costs were incurred and that they are reasonable.

41. The costs certification says, also, that it is estimated in good faith that the Office of the Attorney General has billed or will bill an additional \$1,106 in costs to the bureau for further preparation. An estimate of costs expected to be incurred in the future fails to satisfy the requirements of either Business and Professions Code section 125.3 or California Code of Regulations, title 1, section 1042. An estimate of costs that were incurred in the past can support an award only if the agency explains "the unavailability of actual cost information" as is required by California Code of Regulations, title 1, section 1042, subdivision (b)(5). Thus, the estimated costs are not allowed.

42. Respondent has been earning approximately \$10,000 a month, but without her psychiatric technician license, she probably will not be able to earn such a substantial income. She pays \$600 a month in rent and a \$300 car payment. She has no medical or dental coverage. Her children have medical coverage through their father's employer. Respondent's three children stay with her five days a week most of the time. Respondent's mother lives with respondent and cares for the children when respondent is at work. Respondent supports herself, her children, and her mother. Respondent is divorced. Her former husband does not pay child support.

#### *LEGAL CONCLUSIONS*

*MAY CONDUCT BE A GROUND FOR IMPOSING LICENSE DISCIPLINE PURSUANT TO SECTION 4521, SUBDIVISION (a), IN SPITE OF THE FACT THAT THE CONDUCT OCCURRED BEFORE LICENSURE?*

1. Business and Professions Code section 4521, subdivision (a), provides that the bureau may suspend or revoke a license for unprofessional conduct. That subdivision lists a number of examples of unprofessional conduct.

2. Pursuant to that subdivision, the bureau may discipline a psychiatric technician's license for wrongful conduct in which the licensee engaged after the license was issued. Respondent contends that the bureau, however, may not rely on that subdivision to discipline a psychiatric technician's license for wrongful conduct in which the licensee engaged before the license was issued when, as here, the license was not obtained by fraud. Subdivision (a) does not expressly authorize the bureau to discipline a license based on wrongful conduct that occurred before licensure, but neither does it expressly limit the bureau to relying on wrongful conduct that occurred after licensure. Subdivision (a) would

be reasonably subject to either interpretation. Thus, it is ambiguous, and principles of statutory construction must be used to determine what it should be held to mean.

3. The Supreme Court of California faced a similar circumstance in *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763. Hughes studied architecture in Virginia and Massachusetts but was not graduated. He established a firm, employed architects, and personally performed work that did not require a license. After some time, however, he began performing work that did require a license. He later held himself out as an architect and took measures to conceal the fact that he had no license. While Hughes was engaged in the design of an addition to the residence of Vice President Dan Quayle, it was discovered that he had no license. The Board of Architectural Examiners of Washington, D.C. initiated disciplinary proceedings. In 1990 Hughes applied for licensure in California. In his application and supplemental letter he disclosed substantial information about not having completed the licensing procedure in Washington, D.C., about his professional status having been called into question, and about having entered a plea to a charge of misrepresentation. Hughes successfully completed the California examination and obtained a California license. In 1992 the California Board of Architectural Examiners filed accusations alleging, among other things, that Hughes's practice in Virginia amounted to willful misconduct in the practice of architecture. Hughes contended that the statutes under which the board charged him did not permit license discipline based on conduct that occurred before licensure. The Supreme Court concluded that the statutes were ambiguous and proceeded to construe them.

4. The Court looked to the entire statutory scheme, the history of the statutes, the apparent purpose of the statutory scheme, and considerations of constitutionality. The Court concluded that the board could rely on wrongful conduct that occurred before licensure. The Court emphasized the legislative purpose underlying licensing schemes generally. They are not intended to punish a licensee but to protect the public. When the Legislature intends to protect the public health, safety, and welfare by use of a licensing scheme, the law should be interpreted broadly so that licensees will not be able to evade a statute's protective purpose. Moreover, courts have long recognized the authority of a licensing entity to examine a party's past conduct in determining his or her fitness to undertake or continue a business or profession. Past conduct furnishes evidence of fitness. The Court observed that, under certain circumstances, an agency might be estopped to assert pre-licensure conduct as a ground for revocation but concluded that estoppel was not justified in *Hughes*.

5. In the present case, the *Hughes* Court's analysis and conclusion are persuasive. Also, pursuant to Business and Professions Code section 4511, subdivision (d), the bureau may deny an application for licensure if an applicant has committed any act that would be grounds for disciplinary action. Thus, if an applicant has engaged in any of the conduct specified in Business and Professions Code section 4521, subdivision (a), the bureau may refuse to issue a license. This reinforces the conclusion that the bureau's authority pursuant to section 4521 is focused on the wrongful nature of the conduct and not on when it occurred.

6. Respondent did not phrase her challenge in terms of equitable estoppel, and the facts in the present matter would not support an estoppel. The doctrine ordinarily will apply against a governmental entity only in an unusual circumstance when necessary to avoid a grave injustice and when the result would not defeat a strong public policy. (*Hock Investment Co. v. City and County of San Francisco* (1989) 215 Cal.App.3d 438.) The evidence does not show that grave injustice would result from the issuance of the license to respondent and a subsequent revocation. On the other hand, the imposition of an estoppel would work to defeat the strong public policy of regulating the psychiatric technician profession.

*MAY CONDUCT BE "UNPROFESSIONAL" WITHIN THE TERMS OF SECTION 4521, SUBDIVISION (a), IN SPITE OF THE FACT THAT THE PERSON WHO ENGAGED IN THE CONDUCT WAS NOT ACTING IN ANY PROFESSIONAL CAPACITY?*

7. As noted above, Business and Professions Code section 4521, subdivision (a), provides that the bureau may suspend or revoke a license for unprofessional conduct, and the subdivision lists a number of examples of unprofessional conduct. It appears from some of those examples that the person who engaged in the conduct need not have been acting in a professional capacity at the time. If a person illegally obtained or possessed a controlled substance that conduct would be, within the terms of subdivision (a), "unprofessional conduct." If a person used an alcoholic beverage to an extent or in a manner dangerous or injurious to himself or herself, that conduct would be "unprofessional conduct." If a person was convicted of falsifying records concerning the prescription of a controlled substance or dangerous drug, that would be "unprofessional conduct." If a court committed a person for intemperate use of a controlled substance, dangerous drug, or alcohol that would be "unprofessional conduct." Thus, within the terms of subdivision (a), conduct may be deemed to be unprofessional and grounds to impose license discipline in spite of the fact that the person who engaged in the conduct was not acting in any professional capacity.

*MAY AN ACT OF SEXUAL ABUSE, MISCONDUCT, OR RELATIONS BE "UNPROFESSIONAL" WITHIN THE TERMS OF SECTION 726 IN SPITE OF THE FACT THAT THE PERSON WHO ENGAGED IN THE CONDUCT WAS NOT ACTING IN ANY PROFESSIONAL CAPACITY?*

8. Business and Professions Code section 726 provides, in part, as follows:

The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division . . . .

9. Section 726 is in division 2 of the Business and Professions Code, which concerns "healing arts." Thus, the patients, clients, or customers referred to in section 726 are patients, clients, or customers of people who are licensed in one or more of the healing arts. The legislature has sought to provide special protection for such people to protect them

from being taken advantage of and to protect them from becoming involved in a relationship that might interfere with their benefiting from health care.

10. If a person, while licensed in one of the healing arts other than psychiatric technician, engaged in such conduct and subsequently obtained a psychiatric technician license, section 726 would establish that the conduct was “unprofessional.” And section 4521, subdivision (a), would authorize the bureau to take disciplinary action in spite of the fact that the conduct occurred before the person was licensed as a psychiatric technician. Similarly, if a person, while licensed in one of the other healing arts, engaged in such conduct and subsequently applied for a psychiatric technician license, section 726 would establish that the conduct was “unprofessional.” And section 4521, subdivision (a), read with section 4511, subdivision (d), would authorize the bureau to refuse to issue a psychiatric technician license.

11. The language of Business and Professions Code section 726, however, strongly suggests that the Legislature intended that section to apply only to the circumstance in which someone engaged in wrongful conduct while licensed in one of the healing arts. Thus, if someone engaged in wrongful conduct before being licensed in any healing art but subsequently was licensed, the question of whether section 726 causes the conduct to be “unprofessional” is an extremely difficult one.

12. But, in the present case, it is not necessary to decide whether section 726 is ambiguous in that regard. That is, it is not necessary to answer that extremely difficult question. It is not necessary because respondent’s violation of the policies that were so clearly part of her training as a PLPT was “unprofessional” within the terms of section 4521, subdivision (a). It simply is not necessary to rely on section 726 to determine that her wrongful conduct was unprofessional.

*MAY AN ACT THAT IS PUNISHABLE AS A SEXUALLY RELATED CRIME BE A GROUND FOR IMPOSING LICENSE DISCIPLINE PURSUANT TO SECTION 4521, SUBDIVISION (m), IN SPITE OF THE FACT THAT THE ACT OCCURRED BEFORE LICENSURE?*

13. Business and Professions Code section 4521, subdivision (m), provides as follows:

The board may suspend or revoke a license . . . for any of the following reasons:

[¶] . . . [¶]

The commission of an act punishable as a sexually related crime, if that act is related to the duties and functions of the licensee.



14. Subdivision (m) is not ambiguous with regard to whether pre-licensure conduct can be grounds for imposing license discipline. Many sexual acts could be "related to the duties and functions of [a] licensee" in spite of the fact that the person who engaged in the act was not licensed at the time. For example, rape would always be related to the duties and functions of a licensee because of a concern for the vulnerable populations with whom licensees often work. Thus, rape is "related to the duties and functions of [a] licensee" whether or not the perpetrator was licensed when the rape occurred.

*ENGAGING IN SEXUAL INTERCOURSE AS CONSTITUTING UNPROFESSIONAL CONDUCT WITHIN THE TERMS OF SECTION 4521, SUBDIVISION (a)*

15. By reason of the matters set forth in Findings 21 through 27 and 30 through 33, it is determined that respondent, while employed as a PLPT, engaged in sexual intercourse with a client. As determined above, within the terms of Business and Professions Code section 4521, subdivision (a), conduct may be deemed to be "unprofessional" in spite of the fact that the person who engaged in it was not acting in any professional capacity. By reason of the matters set forth in Findings 5 through 16, 19, and 22, it is determined that respondent's conduct was "unprofessional" within the terms of subdivision (a). Respondent had explicit training concerning boundaries, the proscription against sexual conduct with clients, and her responsibility to promote the goals of clients' therapeutic programs. In spite of being in an extremely important and sensitive position, respondent chose to violate the policies she knew applied to her.

16. It is determined that, within the terms of California Code of Regulations, title 16, section 2578, respondent's having engaged in sexual intercourse with CM evidences respondent's present or potential unfitness to perform the functions authorized by her license in a manner consistent with the public health, safety, or welfare. Respondent refuses to acknowledge her conduct and explain why there is no risk of her repeating it. Consequently, her conduct evidences a present or potential unfitness to perform the functions authorized by her license in a manner consistent with the public health, safety, or welfare.

17. Thus, there are grounds to suspend or revoke respondent's license.

*COMMISSION OF AN ACT PUNISHABLE AS A SEXUALLY RELATED CRIME*

18. Complainant alleges that respondent committed an act that would be punishable as a sexually related crime. As noted above, Business and Professions Code section 4521, subdivision (m), provides as follows:

The board may suspend or revoke a license . . . for any of the following reasons:

(a) . . .

The commission of an act punishable as a sexually related crime, if that act is related to the duties and functions of the licensee.<sup>2</sup>

19. Respondent makes a number of objections to subdivision (m). Respondent contends that it would violate due process and equal protection standards under both the state and federal constitutions to impose license discipline based on a determination that respondent committed an act punishable as a crime.

20. The grounds respondent asserts are as follows: In a criminal matter, one is entitled to a jury trial. Clear and convincing proof to a reasonable certainty is not a permissible standard of proof in a criminal matter. Government Code section 11513, subdivision (d), concerning the admission of hearsay evidence, may not be used in a criminal matter.

21. Those contentions are not well-founded. The present proceeding is not a criminal proceeding. No punishment will be imposed. If it is determined that respondent committed an act punishable as a crime, that determination would have no res judicata effect in a subsequent criminal prosecution.

22. Complainant alleges that respondent committed an act that would be punishable as sexual battery as defined in Penal Code section 243.4, subdivision (b). That subdivision provides as follows:

Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery.

23. Complainant failed to prove that the sexual touching was against CM's will and failed to prove that CM was incapable of consenting to or refusing sexual encounters. CM is mildly mentally retarded, and his retardation constitutes a developmental disability. There was no evidence, however, that that would cause him to be incapable of giving legal consent to a sexual encounter.

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<sup>2</sup> The allegation concerning an act punishable as a sexually related crime is at paragraph 20 of complainant's third amended accusation. Paragraph 20 has a heading of "unprofessional conduct." But Business and Professions Code section 4521 does not deal with acts punishable as sexually related crimes in terms of their amounting to unprofessional conduct. That is, acts punishable as sexually related crimes are not dealt with under section 4521, subdivision (a). Commission of an act punishable as a sexually related crime is dealt with at subdivision (m) and is a discrete ground for imposing license discipline. Thus, the allegation regarding an act punishable as a sexually related crime will be treated as alleging only subdivision (m) as a ground for imposing license discipline.

24. Complainant alleges that respondent committed an act that would be punishable as rape as defined in Penal Code section 261, subdivision (a)(1). That subdivision provides as follows:

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonable should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act . . . the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

25. As noted above, there was no evidence that CM's condition would cause him to be incapable of giving legal consent to a sexual encounter.

26. The allegation that respondent committed an act punishable as a sexually related crime is not sustained.

*FAILING TO MAINTAIN PROFESSIONAL BOUNDARIES AS CONSTITUTING UNPROFESSIONAL CONDUCT*

27. Complainant alleges that respondent engaged in unprofessional conduct in that she failed to maintain professional boundaries.<sup>5</sup> That allegation will be treated as alleging that, within the terms of Business and Professions Code section 4521, subdivision (a), respondent engaged in unprofessional conduct.

28. By reason of the matters set forth in Finding 17, it is determined that respondent, while employed as a PLPT, failed to maintain professional boundaries. By reason of the matters set forth in Findings 5 through 19, it is determined that respondent's conduct was "unprofessional" within the terms of Business and Professions Code section 4521, subdivision (a).

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<sup>5</sup> This allegation is at paragraph 20, subdivision (b), of complainant's third amended accusation. As noted above, paragraph 20 concerns "unprofessional conduct," which is dealt with at Business and Professions Code Section 4521, subdivision (a), and this allegation will be treated as alleging that subdivision as a ground for imposing license discipline. Complainant alleges a different subdivision. Complainant alleges that failing to maintain professional boundaries comes "within the meaning of [Business and Professions] Code Section 4521, subdivision (d)," but that subdivision concerns violations of provisions of chapter 10, the Psychiatric Technician Law. And complainant did not point to any provision of chapter 10 that specifically concerns maintaining professional boundaries.

29. It is determined that, within the terms of California Code of Regulations, title 16, section 2578, respondent's failure to maintain professional boundaries with CM evidences respondent's present or potential unfitness to perform the functions authorized by her license in a manner consistent with the public health, safety, or welfare. Respondent did not explain why there is no risk of her repeating her conduct. Consequently, her conduct evidences a present or potential unfitness to perform the functions authorized by her license in a manner consistent with the public health, safety, or welfare.

30. With regard to respondent's conduct after she was licensed, there is an additional reason to find that her conduct was unprofessional. California Code of Regulations, title 16, section 2576.6, subdivisions (b)(3) and subdivision (c), provide that a violation of ethical and professional standards regarding professional boundaries constitutes unprofessional conduct.

31. Thus, there are grounds to suspend or revoke respondent's license.

*WHAT LICENSE DISCIPLINE IS APPROPRIATE?*

32. Respondent is to be congratulated for the very good reputation she has earned while working for the California Department of Corrections and Rehabilitation for the past two years.

33. The evidence, however, does not support a conclusion that it would be in the public interest for respondent to hold a probationary license. Respondent created a security risk for the facility by having sex with a client who had a history of harming people. Her conduct created a risk that other employees might have needed to extract her from harm's way. If they had had to do that, respondent might have been injured. CM might have been injured. Other clients and respondent's colleagues might have been injured. Moreover, respondent knew that she had an obligation to promote the success of CM's therapeutic programs, but she, nevertheless, engaged in conduct with him that was contrary to what his programs indicated he needed. And she did this for personal gratification. It has been less than three and one-half years since respondent had sex with CM, and it has been just over three years since respondent stopped her extensive personal communications with CM. Two months before respondent had sex with CM, Mr. Bradley and Ms. Scates counseled her about boundaries issues. Only a few months before that, PDC provided respondent with explicit training on boundary issues. Moreover, respondent refuses to acknowledge that she had sex with CM and, therefore, is not in a position to explain why the bureau can be confident that she will not engage in similar or other serious acts of unprofessional conduct.

34. Respondent is presently or potentially unfit to perform the functions authorized by her license in a manner consistent with the public health, safety, and welfare. The appropriate license discipline is revocation.

## COSTS

35. By reason of the matters set forth in Finding 40, it is determined that the bureau's costs in this matter were \$13,914 and that, within the terms of Business and Professions Code section 125.3, those costs were reasonable.

36. In *Zuckerman v. State Board of Chiropractic Examiners*,<sup>4</sup> a case in which the State Board of Chiropractic Examiners had disciplined a licensee, the Supreme Court of California dealt with the issue of cost recovery. The court held that "the Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that ... [cost recovery] does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The court established five rules that an agency must observe in assessing the amount to be charged. To some extent, these rules are similar to matters one would consider in determining whether costs are "reasonable" as is required by Business and Professions Code section 125.3. The court's rules, however, go beyond considerations of whether the costs are reasonable. The court said:

[T]he Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [Citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [Citation.] Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [Citation] the Board must determine that the chiropractor will be financially able to make later payments. Finally the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a chiropractor engaged in relatively innocuous misconduct.<sup>5</sup>

37. In this case, complainant proved that respondent engaged in the conduct that is the primary focus of the accusation. However, respondent had a good faith belief in the merits of her position and successfully defended against complainant's attempt to prove one of the alleged grounds for imposing license discipline. That is, respondent successfully defended against the allegation that she had committed an act punishable as a sexually

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<sup>4</sup> *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

<sup>5</sup> *Id.* at p. 45.



related crime. Thus, assessing the full costs of investigation and prosecution against respondent would unfairly penalize her.

38. This was not a case in which the bureau conducted a disproportionately large investigation and prosecution to prove relatively innocuous misconduct.

39. Will respondent be financially able to reimburse the bureau for its costs? Because respondent's license is being revoked, the determination of that issue should be left to the future. It should be left to a time when respondent may prove that her license should be reinstated.

40. Thus, application of the *Zuckerman* rules requires that the cost award be reduced so as not to unfairly penalize respondent. Because respondent successfully defended against the allegation that she had committed an act punishable as a sexually related crime, the reduction should be substantial. It is determined that the costs should be reduced to \$9,000.

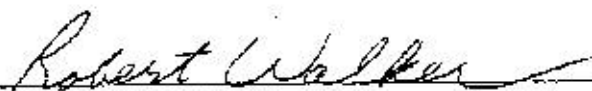
41. Also, if respondent's license is reinstated, the bureau, as is required by *Zuckerman*, must determine whether a payment schedule is necessary so that respondent will be financially able to pay the bureau's costs.

#### ORDER

1. Psychiatric technician license number PT 32867 issued to respondent, Daphne Leanne Ervin, is revoked.

2. If respondent applies for reinstatement of her license and if the bureau determines that she has been rehabilitated and satisfies all requirements for reinstatement, the bureau, as is required by *Zuckerman*, shall determine whether respondent will be financially able to reimburse the bureau for its costs. If the bureau determines that respondent will be financially able to reimburse the bureau for its costs, the bureau must then determine whether a payment schedule will be necessary so that respondent will be financially able to pay the costs. If the bureau determines that respondent will not be able to make payments on the cost recovery, the bureau shall not recover costs. If the bureau determines that respondent will be able to make payments on the cost recovery, the bureau may issue a probationary license and impose a condition requiring respondent to make payments in an amount set by the bureau until respondent has paid a total of \$9,000 in cost recovery.

DATED: December 23, 2008

  
ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

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8 **BEFORE THE DIRECTOR OF**  
9 **DEPARTMENT OF CONSUMER AFFAIRS**  
10 **BUREAU OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS**  
11 **STATE OF CALIFORNIA**

12 In the Matter of the Second Amended Accusation  
Against:

Case No. PT-2005-1331

13 **DAPHNE LEANNE ERVIN**  
14 258 N. G Street, #11  
Porterville, California 93257

**THIRD A M E N D E D**  
**ACCUSATION**

15  
16 Psychiatric Technician License PT 32867

17 Respondent.

18 Complainant alleges:

19 **PARTIES**

20 1. Teresa Bello-Jones, J.D., M.S.N., R.N. ("Complainant") brings this Third  
21 Amended Accusation solely in her official capacity as the Executive Officer of the Bureau of  
22 Vocational Nursing and Psychiatric Technicians ("Bureau")<sup>1</sup>, Department of Consumer Affairs  
23 ("Department").  
24 ///

25  
26  
27 1. On July 1, 2008, the legislation for the Board of Vocational Nursing and Psychiatric  
28 Technicians sunsetted. Business and Professions Code section 101.1(b) applies. As used  
hereinbelow, "Board" and "Bureau" are used interchangeably.

2. On or about August 26, 2005, the Bureau issued Psychiatric Technician License PT 32867 to Daphne Leanne Ervin ("Respondent"). The License will expire on May 31, 2009, unless renewed.

### JURISDICTION

3. This Accusation is brought before the Bureau under the authority of the following laws. All section references are to the Business and Professions Code ("Code") unless otherwise indicated.

4. Section 101.1(b) of the Code states:

(1) In the event that any board, as defined in Section 477, becomes inoperative or is repealed in accordance with the act that added this section, or by subsequent acts, the Department of consumer Affairs shall succeed to and is vested with all the duties, powers, purposes, responsibilities and jurisdiction not otherwise repealed or made inoperative of that board and its executive officer.

(2) Any provision of existing law that provides for the appointment of board members and specifies the qualifications and tenure of board members shall not be implemented and shall have no force or effect while that board is inoperative or repealed. Every reference to the inoperative or repealed board, as defined in Section 477, shall be deemed to be a reference to the department.

5. Section 477 of the Code states, in part:

As used in this division:

(a) "Board" includes "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency."

### STATUTORY PROVISIONS

6. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender, cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

7. Section 726 of the Code states, in relevant part:

The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this



1 division, under any initiative act referred to in this division and under  
2 Chapter 17 (commencing with Section 9000) of Division 3.

3 8. Section 4520 of the Code provides, in pertinent part, that the Board may discipline  
4 any licensed psychiatric technician for any reason provided in Article 3 (commencing with  
5 section 4520) of the Psychiatric Technicians Law (Code, § 4500, et. seq.)

6 9. Section 4521 of the Code states, in pertinent part:

7 The board may suspend or revoke a license issued under this  
8 chapter [the Psychiatric Technicians Law (Bus. & Prof Code, 4500,  
et seq.)) for any of the following reasons:

9 (a) Unprofessional conduct, which includes but is not limited to  
10 any of the following:

11 (d) Violating or attempting to violate, directly or indirectly, or  
12 assisting in or abetting the violation of, or conspiring to violate any  
provision or terms of this chapter.

13 (m) The commission of any act punishable as a sexually related  
14 crime, if that act is substantially related to the duties and functions of  
the licensee.

15 10. Penal Code section 243.4, provides, in relevant part:

16 (b) Any person who touches an intimate part of another person  
17 who is institutionalized for medical treatment and who is seriously  
18 disabled or medically incapacitated, if the touching is for the purpose  
19 of sexual arousal, sexual gratification, or sexual abuse, is guilty of  
20 sexual battery. A violation of this subdivision is punishable by  
imprisonment in a county jail for not more than one year, and by a  
fine not exceeding two thousand dollars (\$2,000); or by imprisonment  
in the state prison for two, three or four years, and by a fine not  
exceeding ten thousand dollars (\$10,000).

21 (f) As used in subdivision . . . (b), . . . "touches" means physical  
22 contact with another person, whether accomplished, directly, through  
clothing of the person committing the offense, or through the clothing  
of the victim.

23 (g) As use din this section, the following terms have the following  
24 meanings:

25 (1) "Intimate part" means the sexual organ, anus, groin, or  
26 buttocks of any person, and the breast of a female.

27 ///

28 ///

1 (3) "Seriously disabled" means a person with severe physical or  
2 sensory disabilities.<sup>2</sup>

3 (5) "Institutionalized" means a person who is located voluntarily  
4 or involuntarily in a hospital, medical treatment facility, nursing  
home, acute care facility, or mental hospital.

5 11. Penal Code section 261, subdivision (a), provides, in pertinent part:

6 (a) Rape is an act of sexual intercourse accomplished with a person  
7 not the spouse of the perpetrator, under any of the following  
circumstances:

8 (1) Where a person is incapable, because of a mental disorder or  
9 developmental or physical disability, of giving legal consent, and this is  
known or reasonably should be known to the person committing the act.

10 12. Penal Code section 264 provides:

11 (a) Rape, as defined in Section 261 . . . , is punishable by imprison-  
12 ment in the state prison for three, six, or eight years.

13 (b) In addition to any punishment imposed under this section the  
14 judge may assess a fine not to exceed seventy dollars (\$70) against any  
person who violates Section 261 . . . .

### 15 REGULATORY PROVISIONS

16 13. California Code of Regulations ("Regulations"), title 16, section 2576.6, states,  
17 in pertinent part:

18 (b) A licensed psychiatric technician shall adhere to standards of  
19 the profession and shall incorporate ethical and behavioral standards  
of professional practice which include but are not limited to the  
following:

20 (3) Maintaining professional boundaries with the patient/client;

21 (c) A violation of this section constitutes unprofessional conduct  
22 for purposes of initiating disciplinary action.

23 14. Regulations, section 2578, states, in pertinent part:

24 For the purposes of denial, suspension, or revocation of a license  
25 pursuant to Division 1.5 (commencing with Section 475) of the  
Business and Professions Code, a crime or act shall be considered to  
be substantially related to the qualifications, functions or duties of a

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26  
27 2. Penal Code section 243.4, subdivision (g)(3), was inadvertently omitted from page  
28 Section 3, The Amendments to the SAA, in Complainant's Reply Brief. Respondent is on  
notice for this alleged violation as argued in Section 4.b, second paragraph.

1 licensed psychiatric technician if to a substantial degree it evidences  
2 present or potential unfitness of a licensed psychiatric technician to  
3 perform the functions authorized by his license in a manner consistent  
4 with the public health, safety, or welfare. Such crimes or acts shall  
5 include but not be limited to those involving the following:

6 (c) Violating or attempting to violate, directly or indirectly, or  
7 assisting in or abetting the violation of, or conspiring to violate any  
8 provision or term of Chapter 10, Division 2 of the Business and  
9 Professions Code.

#### 10 COST RECOVERY

11 15. Code section 125.3 provides, in pertinent part, that the Board may request the  
12 administrative law judge to direct a licensee found to have committed a violation or violations  
13 of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and  
14 enforcement of the case.

#### 15 FACTUAL ALLEGATIONS

16 16. On an unknown date occurring between late July 2005 and mid-August 2005,  
17 Respondent while employed in the Secured Treatment Area with the State of California for the  
18 Department of Developmental Services at Porterville Development Center ("Center"), and  
19 performing the duties of a Pre-Licensed Psychiatric Technician ("PLPT") classification, engaged  
20 in acts of sexual abuse, misconduct, or relations with developmentally disabled client C.M.  
21 Center clients such as C.M. who reside in the Secured Treatment Area of the Center are  
22 determined to be a risk to themselves and/or others. The PLPT classification practices in the  
23 professional field covered by the training, skills and knowledge necessary for licensure as a  
24 Psychiatric Technician.

25 17. On various dates occurring between June and October 2005, Respondent, while  
26 employed in the Secured Treatment Area of the Center and performing the duties of a PLPT,  
27 engaged in inappropriate acts and interactions with developmentally disabled client C.M.  
28 including, but not limited to, establishing a social or personal connection with C.M., sharing  
personal information about herself with C.M. including her cellular telephone number and  
information about her children, and making telephone calls to and accepting them from C.M.  
Respondent engaged in those acts pre- and post-licensure and while she worked as a PLPT and

1 practiced in the professional field covered by the training, skills and knowledge necessary for  
2 licensure as a Psychiatric Technician.

3 18. Respondent's conduct, set forth in paragraphs 16 and 17, above, was reported on  
4 or about August 23, 2005, and was investigated by the Center. The Bureau was unaware of the  
5 report or investigation and consequently issued PT License 32867 to Respondent on August 26,  
6 2005. As a result of the investigation which concluded on or about October 28, 2005, Respon-  
7 dent was served with a Notice of Adverse Action ("NOAA"), terminating her from her position  
8 with the Center. Respondent resolved the NOAA by settlement in late December 2005 and  
9 resigned from her position with the Center. The Bureau was notified of the matters set forth  
10 herein and in paragraphs 16 and 17, above, after December 2005.

#### 11 **FIRST CAUSE FOR DISCIPLINE**

12 (Sexual Misconduct)

13 19. Respondent's license is subject to discipline under Code section 4520, on the  
14 grounds of unprofessional conduct within the meaning of Code section 4521, subdivision (a), in  
15 that while she was employed by the Center as a PLPT and working in the professional field  
16 covered by the training, skills and knowledge necessary for licensure as a Psychiatric Technician,  
17 she committed acts of sexual abuse, misconduct, or relations with client/patient C.M., within the  
18 meaning of Code section 726 and Regulations, title 16, section 2578, subdivision (c); which acts  
19 are substantially related to the qualifications, functions or duties of a licensed Psychiatric  
20 Technician, as alleged in paragraph 16 and 18, above.

#### 21 **SECOND CAUSE FOR DISCIPLINE**

22 (Unprofessional Conduct)

23 20. Respondent's license is subject to discipline under Code section 4520 on the  
24 grounds of unprofessional conduct in that while Respondent was licensed as a Psychiatric  
25 Technician and employed at the Center:

26 a. Respondent committed acts which are punishable as a sexually related crime  
27 under Penal Code sections 243.4, subdivision (b), and/or 261, subdivision (a)(1), and 264, which  
28 acts are substantially related to the qualifications, functions, and duties of a licensed Psychiatric

1 Technician within the meaning of Code section 4521, subdivision (m), and Regulations, title 16,  
2 section 2578, subdivision (c), as alleged in paragraphs 16 and 18, above.

3 b. Respondent violated standards of the Psychiatric Technician profession when she  
4 failed to maintain professional boundaries within the meaning of Code section 4521, subdivision  
5 (d), and Regulations, title 16, section 2576.6, subdivisions (b)(3) and (c), as alleged in paragraphs  
6 16, 17, and 18, above.

7 **PRAYER**


8 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein  
9 alleged, and that following the hearing, the Bureau of Vocational Nursing and Psychiatric  
10 Technicians issue a decision:

11 1. Revoking or suspending Psychiatric Technician License PT 32867 issued to  
12 Daphne Leanne Ervin.

13 2. Ordering Respondent Daphne Leanne Ervin to pay the Bureau of Vocational  
14 Nursing and Psychiatric Technicians the reasonable costs of the investigation and enforcement of  
15 this case, pursuant to Business and Professions Code section 125.3;

16 3. Taking such other and further action as deemed necessary and proper.

17  
18 DATED: September 30, 2008

19  
20   
21 TERESA BELLO-JONES, J.D., M.S.N., R.N.,  
22 Executive Officer  
23 Bureau of Vocational Nursing and Psychiatric Technicians  
24 State of California  
25 Complainant  
26  
27  
28